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**IN THE  
COURT OF APPEALS OF INDIANA**

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STATE OF INDIANA,	)	
	)	
Appellant-Plaintiff,	)	
	)	
vs.	)	No. 49A02-0509-PC-901
	)	
PAUL TRICE,	)	
	)	
Appellee-Defendant.	)	

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APPEAL FROM THE MARION SUPERIOR COURT  
The Honorable Nancy Broyles, Master Commissioner  
Cause No. 49G05-9608-PC-120978

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**August 30, 2006**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**SHARPNACK, Judge**

The State of Indiana appeals the post-conviction court's grant of post-conviction relief to Paul Trice. The State raises one issue, which we restate as whether the post-conviction court erred when it found Trice received the ineffective assistance of trial and appellate counsel. We affirm in part, reverse in part, and remand.

The relevant facts from Trice's direct appeal follow.

On August 11, 1996, Nathan Williams and Welby Hendrickson drove to 2800 North Kenwood in Indianapolis, where the D'Ware gang was known to sell drugs. Upon arrival, they observed Paul "Champ" Trice, Derrick "Little D" Proctor and several other unidentified individuals drinking liquor. Proctor and his companions approached Williams's vehicle and placed a bottle of liquor and a beer on the roof. An unidentified person then sold cocaine to Williams and Hendrickson. As Williams drove away, Proctor whistled for him to stop. The drinks fell from the roof of the vehicle as it came to a stop. Proctor demanded that Williams and Hendrickson pay for the liquor. When they refused, Proctor reached through the open car window and struck Williams. Proctor, Trice and several others then pulled Williams from the car and beat him while Hendrickson fled the scene.

Sometime thereafter, Hendrickson returned to the scene of the beating and found Williams lying unconscious next to his vehicle. Hendrickson was unable to revive Williams, whose jewelry and shoes were missing. After a local resident called the police, Indianapolis Police Officer Timothy Snyder arrived and radioed for an ambulance. Williams was then transported to an Indianapolis hospital where he remained comatose for nearly three weeks. Williams was later moved to a nursing home where he underwent rehabilitation. Eventually, Williams was released but has been unable to return to work because of his injuries.

During their investigation, the police identified Proctor's fingerprints on the automobile and Trice's fingerprints on the liquor bottle. Hendrickson informed the police that Williams had been beaten by "Champ" and "Little D," and he then identified the two men in a photo array. Subsequently, Indianapolis Police Officer Scott Sitton identified Proctor and Trice as members of the D'Ware gang.

Trice v. State, 693 N.E.2d 649, 650 (Ind. Ct. App. 1998).

The State charged Trice with robbery as a class A felony,<sup>1</sup> aggravated battery as a class B felony,<sup>2</sup> criminal gang activity as a class D felony,<sup>3</sup> and being an habitual offender.<sup>4</sup> Id. After a jury trial, Trice was convicted of aggravated battery and criminal gang activity but acquitted of robbery and was found to be an habitual offender. Id. Trice was sentenced to twenty years for aggravated battery. Id. That sentence was enhanced by thirty years based on the determination that Trice was an habitual offender. Id. Trice also received a concurrent sentence of one and one-half years for the criminal gang activity conviction for a total sentence of fifty years. Id.

On direct appeal, Trice argued that the evidence was insufficient to sustain his convictions for aggravated battery and criminal gang activity and that his sentence was manifestly unreasonable. Id. This court held that the evidence was sufficient to sustain Trice's conviction for aggravated battery and that his sentence was not manifestly unreasonable. Id. at 651-652. However, regarding the criminal gang activity conviction, we held:

[T]he State presented no evidence that the battery was gang related. Rather, the evidence shows that after his alcoholic beverages fell from the roof of the car, Trice spontaneously beat Williams for causing the liquor to

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<sup>1</sup> Ind. Code § 35-42-5-1 (2004).

<sup>2</sup> Ind. Code § 35-42-2-1.5 (Supp. 1996) (subsequently amended by Pub. L. No. 261-1997, § 6 (eff. July 1, 1997)).

<sup>3</sup> Ind. Code § 35-45-9-3 (2004).

<sup>4</sup> Ind. Code § 35-50-2-8 (Supp. 1996) (subsequently amended by Pub. L. No. 166-2001, § 3 (eff. July 1, 2001); Pub. L. No. 291-2001, § 226 (eff. July 1, 2001); Pub. L. No. 71-2005, § 11 (eff. April 25, 2005)).

fall and refusing to pay for it. The State did not present any evidence that Trice acted with specific intent to further the gang's criminal goals. The State's case consists only of evidence that Trice is a gang member and that he committed a criminal act; therefore, the State contends, he engaged in criminal gang activity. We cannot agree because, here, there is no nexus between Trice's alleged gang membership and the crime he committed. Thus, we conclude that the State failed to present substantial evidence of probative value that Trice was involved in criminal gang activity and that his conviction for criminal gang activity should be reversed.

Id. at 651.

Trice filed a petition for post-conviction relief alleging in part that he had received ineffective assistance of trial and appellate counsel. Trice alleged that trial counsel was ineffective in part because trial counsel: (1) advised the jury during opening statement that Trice was asleep at the time of the battery but failed to present any evidence regarding this defense; and (2) failed to request a limiting instruction regarding the evidence of criminal gang activity. Trice alleged that appellate counsel was ineffective in part because appellate counsel: (1) failed to argue on appeal that the trial court should have severed the criminal gang activity charge; and (2) failed to raise an issue regarding the consecutive habitual offender sentences. After a hearing, the post-conviction court entered the following findings of fact and conclusions thereon:

#### FINDINGS OF FACT

\* \* \* \* \*

4. Petitioner alleges the effective assistance of both trial and appellate counsel. He alleges that trial counsel failed to move for a limiting instruction upon the evidence presented at trial regarding gang activities and erred when he told the jury, in opening statement, that he would present evidence of an alibi and then failed to do so. Appellate counsel's alleged deficiencies include his failure to raise

the actions of trial counsel, the court's denial of the severance motion, and the failure to challenge the imposition of consecutive habitual offender enhancements.

5. Petitioner's initial trial counsel filed a motion to sever the charge of criminal gang activity. The trial court denied that motion. Counsel that ultimately represented Petitioner orally, on the morning that trial began, orally renewed the motion to sever and moved in limine to exclude all evidence related to criminal gang activity. Those motions were denied and evidence upon the issue of criminal gang activity was presented. He did not renew the motion at the close of evidence. Trial counsel never tendered any instruction requesting that the evidence related to criminal gang activity be considered on that count only.
6. A third lawyer represented Petitioner at sentencing. At that time, counsel argued that Petitioner's habitual offender enhancement in this cause could not be ordered to be served consecutively to the habitual offender enhancement in cause 49G04-9601-CF-9575.
7. Petitioner appealed his conviction and appellate counsel raised two issues. Specifically, he alleged that the evidence was insufficient to support the verdicts and that the sentence was manifestly unreasonable.
8. At the hearing upon the petition, trial counsel testified that he had little specific recollection of the case. Although he was unable to recall whether or not he considered tendering a[n] instruction, he testified that he did not believe the trial court would have given such an instruction had he tendered it.
9. Appellate counsel also had little specific recollection of the case. He testified that he always reviewed the transcript of any case and then presented only those issues where he, in his experience, believed he was most likely to prevail.

### CONCLUSIONS OF LAW

\* \* \* \* \*

3. Trial counsel's performance was deficient when he informed the jury, during opening statement, that Trice had an alibi and then

failed to present any such evidence. Specifically, counsel stated that “at 3 o’clock in the morning when someone else was fracturing Nathan Williams [sic] skull [sic] Paul Trice was at the same place where most of us were at the time. He was at home [sic] in bed [sic] asleep. That’s it. That’s my defense.” No evidence to that effect was elicited from any State’s witnesses, and the defense presented no evidence. In *Harris v. Reed*, 894 F.2d 871 (7<sup>th</sup> Cir. 1990), the court noted that such a statement by trial counsel leaves a criminal defendant in a precarious position. In *Harris*, the court held that the defendant was denied the effective assistance of counsel when counsel did not present evidence promised in opening statement. The court noted that “counsel’s opening primed the jury to hear a different version . . . Counsel’s failure to do so likely caused the jury to believe that he couldn’t live up to claims made in opening.” *Id.* at 879. Such a failure by counsel has even been found to be prejudicial as a matter of law. *Anderson v. Butler*, 85[8] F.2d 16, 29 (1<sup>st</sup> Cir. 1988). Faith in the jury’s verdict is undermined by counsel’s performance here as “[l]ittle is more damaging than to fail to produce important evidence that ha[s] been promised in opening.” *Id.* at 17.

4. Both trial and appellate counsel were deficient in their actions related to evidence of gang affiliation and/or acts. Specifically, trial counsel failed to move for a limiting instruction as to that evidence and appellate counsel failed to raise the trial court’s denial of the motion to sever the charge of criminal gang activity. Trice’s conviction for criminal gang activity was reversed on appeal due to insufficient evidence. *Trice v. State*, 693 N.E.2d 649 (Ind. Ct. App. 1998). The effect of the evidence of criminal gang activity upon Trice’s conviction for aggravated battery becomes paramount. While the evidence to support that conviction was found to be sufficient, it was not overwhelming. The State, however placed much emphasis on Trice’s gang affiliation, and the record is replete with reference to it.
5. Gang evidence is inherently and highly prejudicial as it is likely that jurors [would] view a defendant’s gang affiliation with disfavor. *United States v. Jernigan*, 341 F.3<sup>rd</sup> 1273 (11<sup>th</sup> Cir. 2003); *United States v. Jobson*, 102 F.3<sup>rd</sup> 214 (6<sup>th</sup> Cir. 1996). Where, as here, there was no relation between the crime of aggravated battery and the gang activity, and there was no limiting instruction, such evidence is particularly harmful. See *United States v. Hendrix*, 52 F.3<sup>rd</sup> 326 (7<sup>th</sup>

Cir. 1995). The performance of both counsel here undermine confidence in the verdict upon the charge of aggravated battery and the subsequent appeal of that conviction. “Gangs generally arouse negative connotations and invoke images of criminal activity and deviant behavior. There is therefore always the possibility that a jury will attach a propensity for committing crimes to defendants who are affiliated with gangs or that a jury’s negative feelings toward gangs will influence its verdict. Guilt by association is a genuine concern whenever gang is admitted.” *United States v. Irvin*, 87 F.3<sup>rd</sup> 860, 865 (7<sup>th</sup> Cir. 1996).

6. Appellate counsel failed to challenge the imposition of consecutive habitual offender enhancements even though that issue was raised by counsel at sentencing. *See Smith v. State*, 774 N.E.2d 1021 (Ind. Ct. App. 2002); *Ingram v. State*, 761 N.E.2d 883 (Ind. Ct. App. 2002). Indiana courts may not impose consecutive habitual offender enhancements. Appellate counsel’s failure to raise the issue could well cause Trice to serve a sentence of four more years than could legally be imposed.
7. Trice [w]as denied the effective assistance of counsel at both the trial and appellate levels. Due to the individual and cumulative errors and the prejudice derived therefrom, Trice’s conviction for aggravated battery must be vacated.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Petition for Post-Conviction [Relief] is granted.

Appellant’s Appendix at 72-75.

We review a State’s appeal from a grant of post-conviction relief under a clearly erroneous standard. *State v. Dye*, 784 N.E.2d 469, 470-71 (Ind. 2003). We neither reweigh the evidence nor judge witness credibility and only consider the probative evidence and reasonable inferences supporting the judgment. *Id.* We reverse only on a showing of clear error – that which leaves us with a definite and firm conviction that a

mistake has been made. Id. Our inquiry is essentially whether there is any way the post-conviction court could have permissibly reached its decision. Id.

We apply the same standard of review to claims of ineffective assistance of appellate counsel as we apply to claims of ineffective assistance of trial counsel. Williams v. State, 724 N.E.2d 1070, 1078 (Ind. 2000), reh’g denied, cert. denied, 531 U.S. 1128, 121 S. Ct. 886 (2001). To prevail on a claim of ineffective assistance of counsel, a petitioner must demonstrate both that his counsel’s performance was deficient and that the petitioner was prejudiced by the deficient performance. Ben-Yisrayl v. State, 729 N.E.2d 102, 106 (Ind. 2000) (citing Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984), reh’g denied), reh’g denied, cert. denied, 534 U.S. 830, 122 S. Ct. 73 (2001). A counsel’s performance is deficient if it falls below an objective standard of reasonableness based on prevailing professional norms. French v. State, 778 N.E.2d 816, 824 (Ind. 2002). To meet the appropriate test for prejudice, the petitioner must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. Id. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” Strickland, 466 U.S. at 694, 104 S. Ct. at 2068. Failure to satisfy either prong will cause the claim to fail. Id.

A. Ineffective Assistance of Trial Counsel.

1. Opening Statement.

During his opening statement, Trice’s counsel stated:



My defense even gets more uninteresting because at 3 o'clock in the morning when someone else was fracturing Nathan Williams['] skull Paul Trice was at the same place where most of us were at the same time. He was at home in bed asleep. That's it. That's my defense. . . . Now, I, you know, I don't know who is guilty of this crime. I wasn't there. I was asleep. He doesn't know, he was asleep. . . .

Direct Appeal Record at 209. However, Trice's counsel did not present any evidence that Trice was asleep during the battery. The post-conviction court found that Trice's trial counsel was deficient for informing the jury during opening statements that Trice had an alibi and then failing to present any such evidence and that Trice was prejudiced by the deficiency.

The Indiana Supreme Court has "regularly held that the decision not to make an opening statement is a matter of trial strategy and will not support an ineffective assistance of counsel claim." Wisehart v. State, 693 N.E.2d 23, 42 (Ind. 1998), reh'g denied, cert. denied, 526 U.S. 1040, 119 S. Ct. 1338 (1999). Likewise, "the content of an opening statement, absent some egregious blunder, is also a matter of strategy." Id. In finding ineffective assistance of trial counsel, the post-conviction court relied upon decisions of the Seventh and First Circuit Courts of Appeals. In both Harris v. Reed, 894 F.2d 871 (7th Cir. 1990), reh'g denied, and Anderson v. Butler, 858 F.2d 16 (1st Cir. 1988), reh'g denied, the courts determined that the defendants received ineffective assistance of counsel after their counsels made remarks during the opening statements about planned defenses and the witnesses who would be called, but thereafter abandoned the defenses which had been planned. In both Harris, 894 F.2d at 872-74, and Anderson, 858 F.2d at 17, the defense counsel made promises of what the evidence would show and

spoke in detail about the planned defense. In Anderson, the defense counsel even promised that two particular witnesses would be called to testify. 858 F.2d at 17. In both cases, the courts found that the counsel's performance was deficient and that the defendants' were prejudiced.

Here, Trice's counsel did not speak in detail about the planned defense or promise that particular witnesses would be called to testify. Trice's counsel merely stated that Trice was asleep at the time of the battery. Even if we assume that Trice's counsel was deficient for mentioning the defense during his opening statement, Trice was not prejudiced by his counsel's opening statement. Trice did not demonstrate that, but for his trial counsel's error, the result of the proceeding would have been different. As we noted on direct appeal, two witnesses identified Trice as one of the men who hit the victim. Trice, 693 N.E.2d at 651. Moreover, evidence was presented at trial that placed Trice at the scene of the crime. There is not a reasonable probability that, but for his trial counsel's claim that he was asleep during the attack and subsequent failure to present such evidence, the jury would have found Trice not guilty. We conclude that the post-conviction court's finding on this issue is clearly erroneous. See, e.g., Haycraft v. State, 760 N.E.2d 203, 212-213 (Ind. Ct. App. 2001) (holding that the defendant was not prejudiced by his trial counsel's opening statement), reh'g denied, trans. denied.

## 2. Limiting Instruction.

Evidence was presented during the trial regarding Trice's alleged gang activity in connection with his charge for criminal gang activity. The post-conviction court found

trial counsel's failure to request a limiting instruction regarding the gang evidence to be ineffective assistance. The post-conviction court found that "[w]here, as here, there was no relation between the crime of aggravated battery and the gang activity, and there was no limiting instruction, such evidence is particularly harmful." Appellant's Appendix at 74.

The Indiana Supreme Court has noted that evidence of "gang membership may be unfairly prejudicial in a criminal prosecution." Richmond v. State, 685 N.E.2d 54, 55 (Ind. 1997). However, here, we are dealing with the failure to request a limiting instruction, not the failure to prevent evidence of gang membership from being admitted. Such evidence was properly admitted because Trice had been charged with criminal gang activity. Even if we assume that Trice's counsel was deficient for failing to request a limiting instruction, Trice was not prejudiced. Trice was required to demonstrate that, but for his trial counsel's error in failing to request a limiting instruction regarding the gang evidence, there is a reasonable probability that the result of his trial for aggravated battery would have been different. Evidence was presented at trial that placed Trice at the scene of the crime, and testimony from witnesses identified Trice as one of the attackers. There is not a reasonable probability that, but for his trial counsel's failure to request a limiting instruction regarding the gang evidence, the jury would have found Trice not guilty of the aggravated battery. We conclude that the post-conviction court's finding on this issue is clearly erroneous. See, e.g., Cooper v. State, 687 N.E.2d 350, 353-354 (Ind. 1997) (holding that the defendant's trial counsel was not ineffective where,

in light of overwhelming evidence of guilt, counsel's alleged failings, including failing to request a limiting instruction, even when viewed cumulatively, did not render the result of the trial fundamentally unfair or unreliable); Mitchell v. State, 690 N.E.2d 1200, 1208-1209 (Ind. Ct. App. 1998) (holding that the defendant's trial counsel was not ineffective for failing to request that the trial court admonish the jury or provide a limiting instruction where the defendant was unable to show that, but for his attorney's failure to request an admonishment or limiting instruction, he would not have been convicted), reh'g denied, trans. denied.

B. Ineffective Assistance of Appellate Counsel.

As previously noted, we apply the same standard of review to claims of ineffective assistance of appellate counsel as we apply to claims of ineffective assistance of trial counsel. Williams, 724 N.E.2d at 1078. A petitioner must demonstrate both that his counsel's performance was deficient and that the petitioner was prejudiced by the deficient performance. Ben-Yisrayl, 729 N.E.2d at 106. Because the strategic decision regarding which issues to raise on appeal is one of the most important decisions to be made by appellate counsel, appellate counsel's failure to raise a specific issue on direct appeal rarely constitutes ineffective assistance. See Taylor v. State, 717 N.E.2d 90, 94 (Ind. 1999). The Indiana Supreme Court has adopted a two-part test to evaluate the deficiency prong of these claims: (1) whether the unraised issues are significant and obvious from the face of the record; and (2) whether the unraised issues are "clearly stronger" than the raised issues. Bieghler v. State, 690 N.E.2d 188, 194 (Ind. 1997),

reh'g denied, cert. denied, 525 U.S. 1021, 119 S. Ct. 550 (1998). If this analysis demonstrates deficient performance by counsel, the court then examines whether the issues that appellate counsel failed to raise “would have been clearly more likely to result in reversal or an order for a new trial.” Id.

1. Motion to Sever.

The post-conviction court found that appellate counsel was ineffective for failing to challenge the trial court’s denial of Trice’s motion to sever the criminal gang activity charge from the aggravated battery and robbery charges. Trice was required to demonstrate that this issue was significant and obvious from the face of the record, was clearly stronger than the raised issues, and would have been clearly more likely to result in reversal.

Ind. Code § 35-34-1-9(a) provides:

Two (2) or more offenses may be joined in the same indictment or information, with each offense stated in a separate count, when the offenses:

- (1) are of the same or similar character, even if not part of a single scheme or plan; or
- (2) are based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan.

Further, Ind. Code § 35-34-1-11(a) provides:

Whenever two (2) or more offenses have been joined for trial in the same indictment or information solely on the ground that they are of the same or similar character, the defendant shall have a right to a severance of the offenses. In all other cases the court, upon motion of the defendant or the prosecutor, shall grant a severance of offenses whenever the court determines that severance is appropriate to promote a fair determination of the defendant’s guilt or innocence of each offense considering:

- (1) the number of offenses charged;

- (2) the complexity of the evidence to be offered; and
- (3) whether the trier of fact will be able to distinguish the evidence and apply the law intelligently as to each offense.

Thus, severance is required as a matter of right under this provision only if the sole ground for joining is that the offenses are of the same or similar character. Kahlenbeck v. State, 719 N.E.2d 1213, 1215 (Ind. 1999).

Here, Trice was charged with robbery, aggravated battery, and criminal gang activity. The charging information for the criminal gang activity provided that Trice and Proctor “did knowingly actively participate in a criminal gang, a group with at least five (5) members that specifically participates or assists in the commission of a felony, that is: Aggravated Battery . . . .” Direct Appeal Record at 78-79. The charges were joined together, not because the offenses were of the same or similar character, but because the offenses were based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan. Consequently, Trice was not entitled to severance as a matter of right. Thus, Trice’s appellate counsel would have been required to show that the trial court abused its discretion because severance was:

appropriate to promote a fair determination of the defendant’s guilt or innocence of each offense considering:

- (1) the number of offenses charged;
- (2) the complexity of the evidence to be offered; and
- (3) whether the trier of fact will be able to distinguish the evidence and apply the law intelligently as to each offense.

The evidence here was not particularly complex, and the jury was considering only three charges. Further, the jury demonstrated that it was able to distinguish the evidence and apply the law intelligently as to each offense by finding Trice not guilty of

the robbery charge. Although we found insufficient evidence to sustain Trice's criminal gang activity conviction on direct appeal because the State failed to prove a connection between the battery and the gang activity, this does not mean that the trial court abused its discretion by failing to sever the charges. Even if appellate counsel had raised the issue on direct appeal, there is no evidence to suggest that the issue would have been likely to result in a reversal of Trice's conviction. See, e.g., Barajas v. State, 627 N.E.2d 437, 438 (Ind. 1994) (holding that the trial court did not abuse its discretion by denying the defendant's motion to sever charges of murder, dealing in cocaine, and corrupt business influence where the murder and the drug charges were intricately connected and the corrupt business influence count was based upon the defendant's drug dealing and his commerce with those who sold drugs on the street for him). We conclude that the post-conviction court's finding on this issue is clearly erroneous.

## 2. Consecutive Habitual Offender Enhancements.

The post-conviction court also found that appellate counsel was ineffective for failing to challenge the imposition of consecutive habitual offender enhancements even though the issue was raised at sentencing. Trice committed the instant offenses while on bond for an unrelated offense. In the unrelated offense, he pleaded guilty to battery as a class C felony and being an habitual offender and received a sentence of four years with a four year habitual offender enhancement. Here, he was sentenced to twenty years for the aggravated battery conviction enhanced by thirty years for his status as an habitual offender to be served consecutive to his sentence in the unrelated offense.

At the time of Trice's sentencing, the Indiana Supreme Court had decided Starks v. State, 523 N.E.2d 735, 737 (Ind. 1988), which held that consecutive habitual offender enhancements at a single trial were not authorized by the statutes. In 2002, several years after Trice's sentencing, we held that consecutive habitual offender enhancements in two separate causes were improper. Smith v. State, 774 N.E.2d 1021, 1024 (Ind. Ct. App. 2002). "It is true that appellate counsel cannot be held ineffective for failing to anticipate or effectuate a change in existing law." Fisher v. State, 810 N.E.2d 674, 679 (Ind. 2004). However, counsel should recognize when an issue is undecided. See id. ("[P]recisely because the law in this area was unsettled and in a state of flux at the time of Fisher's trial and appeal, the issue of whether the trial court erred in refusing to give a lesser-included instruction on reckless homicide was both significant and obvious as well as clearly stronger than the issues raised."). We conclude that this issue was significant, obvious, and undecided, and the post-conviction court's finding that Trice's appellate counsel was ineffective for failing to raise the consecutive habitual offender enhancements is not clearly erroneous. Consequently, Trice's four-year habitual offender enhancement in the unrelated cause cannot be consecutive to his thirty-year habitual offender enhancement in the current cause.<sup>5</sup>

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<sup>5</sup> Trice argues on cross appeal that the post-conviction court erred by failing to address his freestanding fundamental error argument regarding the consecutive habitual offender enhancements. Because we find Trice's appellate counsel was ineffective and conclude that his four-year habitual offender enhancement cannot be consecutive to his thirty-year enhancement, we need not address this allegation of error.



For the foregoing reasons, we affirm the post-conviction court's judgment in part, reverse in part, and remand. Trice's conviction for aggravated battery and his status as an habitual offender stand. The trial court is instructed to resentence Trice, without hearing, so that the four-year enhancement in the unrelated cause will be served concurrent with the thirty-year enhancement in this cause, thereby reducing the total number of years to be served by four years.

Affirmed in part, reversed in part, and remanded.

NAJAM, J. and ROBB, J. concur